82-2118

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES E. LASK AND RUTH L. LASK,
Petitioners,
v.
UNITED STATES OF AMERICA AND MARK W. LAWLER,
Special Agent of the Internal Revenue Service,
Respondents,
and ST. LOUIS UNION TRUST COMPANY, *et al,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LASHLY, CARUTHERS, BAER
& HAMEL, P.C.
MICHAEL G. GOLDSTEIN
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether the Court below erred in holding that the Internal Revenue Service summonses directed to third-party record-keepers should be enforced inasmuch as the IRS acted in bad faith in conducting its investigation of the Taxpayers within the meaning of this Court's decision in *United States* v. *LaSalle National Bank*.

2. Whether the Court below erred in denying Taxpayers' additional discovery requests and in quashing their trial subpoenas duces tecum.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, James E. Lask and Ruth L. Lask pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on March 30, 1983.

1. OPINIONS BELOW

The March 30, 1983 opinion of the Court of Appeals for the Eighth Circuit is unreported and appears in the Appendices to this petition No. 2, pages A-5—A-17. The judgment of the District Court for the Eastern District of Missouri dated April 30, 1982 is unreported and is set out in the Appendices to this petition No. 1, pages A-1—A-4.

II. JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on March 30, 1983 (Appendix No. 2, pages A-5—A-17), the motion for stay of issuance of mandate pending certiorari proceedings was overruled on May 2, 1983.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Internal Revenue Code, 26 U.S.C. §7602, provides:

> (a) Authority to summon, etc.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary of his delegate may deem proper, to appear before the Secretary of his delegate at a time and place names in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

B. Prior to the Tax Equity and Fiscal Responsibility Act of 1982, Internal Revenue Code, 26 U.S.C. §7609(a)(1), provides:

(a) Notice.—

(1) In general.—If—

(A) any summons described in subsection (c) is served on any person who is a third-party record-keeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons.

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain directions for staying compliance with the summons under subsection (b)(2).

C. Internal Revenue Code, 26 U.S.C. §7609(b)(1), provides:

(b) Right to intervene; right to proceeding to quash—

(1) Intervention.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

IV. STATEMENT OF THE CASE

This is an Internal Revenue Service ("IRS") summons enforcement proceeding wherein the IRS is seeking financial records in possession of various third-party record-keepers regarding the alleged tax liability of the Lasks, Taxpayers and Petitioners herein. Taxpayers intervened pursuant to 26 U.S.C. §7609 and opposed enforcement of the summonses on the ground, inter alia, that the IRS abused its congressional authority and acted in bad faith in carrying out its investigation.

In *United States* v. *LaSalle National Bank,* 437 U.S. 298, 318 n. 20, this Court indicated that its requirements for the enforcement of an IRS summons were not intended to be exclusive and that future cases may reveal the need to prevent other forms of IRS abuse of congressional authority and judicial process. Petitioners submit that the facts of this proceeding present just such a "future case" and require granting of certiorari by this Court for consideration and further interpretation of the *LaSalle* footnote 20.

Petitioners attempted in the trial court to conduct discovery by deposition, a Rule 34 request for production of ducuments and by trial subpoenas duces tecum. The lower courts denied said discovery requests, finding that, in summons enforcement proceedings, discovery is the exception rather than the rule. Petitioners believe that recent decisions from other judicial circuits may present a conflict with the Eighth Circuit's ruling thus presenting an additional ground for the grant of certiorari.

The Facts Of the Case

In July, 1980, the St. Louis, Missouri District Office of the IRS began an investigation of the Taxpayers' 1978 and 1979 federal tax returns. The IRS initially decided to audit the Taxpayers based on information provided by an informant. John Barrett was the Revenue Agent assigned to the investigation. Barrett has been employed with the IRS for 3 years and has con-

ducted between 100-400 audits. Albert Grabel, a Certified Public Accountant, represented the Taxpayers in discussions and meetings with Barrett.

On or about August 22, 1980, September 10, 1980 and September 23, 1980, Barrett made several written requests for documents and facts regarding the Taxpayers' tax returns. Grabel fully complied with these requests. On or about October 21, 1980, Barrett sumitted his work papers for the 1978 tax year to Grabel for the latter's review. Barrett found an understatement of income in the sum of $29,158.81. The cover memorandum to Grabel stated, "Please contact me if you have any questions or suggested changes." Subsequent to this transmittal, a meeting was held between Barrett and Grabel and the figures contained in Barrett's work papers were adjusted and agreed upon.

On or about December 8, 1980, Barrett submitted yet another document request to Grabel. Grabel complied with this request. On December 29, 1980, Barrett sent his work papers for the 1979 tax year to Grabel. In his cover memorandum, Barrett indicated the amount of understated income as $37,686.44 and stated, "This number is subject to decrease by satisfactory explanation of the following items and amounts." Grabel was in basic agreement with these figures and was led to believe that the matter was resolved.

The testimony of subpoenaed IRS employees at the April 16, 1982 hearing indicates that transmittal of a revenue agent's work papers to the taxpayer's representatives is an unusual step indicative of the fact that the IRS has completed the investigation. Barrett testified that this was the first time he had ever given his work papers to the taxpayer's representative and later turned the case over to the Criminal Investigation Division of the IRS.

Kenneth Riley, Barrett's Group Manager from April 1981 through July 1981, testified that he was not aware of the fact

that the revenue agent's work papers had been sent to Grabel. He, too, testified that such an act indicates that the investigation is at an end.[1]

Barrett also testified that he is familiar with the IRS Manual and the requirements that it imposes on IRS employees in the conduct of their duties. One of those requirements provides as follows:

> **"Scope for the examination**
>
> If the examination reveals a material understatement of income in a given year the case should be discussed with the group manager in regard to expanding the examination to subsequent or prior years and for possible referral to the Criminal Investigation function for consideration of fraud potential. This discussion is mandatory in all examinations with understatements of income in excess of $10,000 in a given year. These discussions will be documented in the work papers."
> (Resp. Ex. F)

Barrett testified that he had discussions with his Group Manager on a continuing basis from September 1980 through February 1981. Barrett acknowledged, however, that no discussions are documented in his work papers for the 1978 and 1979 tax years as required by the IRS Manual. In addition, Group Manager Kenneth Thompson testified that the Taxpayers' file does not reflect any meetings between Barrett and his Group Manager.

Barrett testified that between October 1980, when he transmitted his 1978 work papers to Grabel, and December 1980, when he transmitted his 1979 work papers to Grabel, he had a series of discussions with his Group Manager about refer-

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[1] At the April 16, 1982 hearing, the Taxpayers learned for the first time that Dennis Salveter, another IRS employee, was Barrett's Group Manager during the time period covered by this first investigation.

ral of the case to the Criminal Investigation Division ("CID"). The audit continued despite the fact that Barrett was exercising his authority as a revenue agent in a civil investigation to obtain information which would later be used by a CID Special Agent. In February 1981, Barrett and his Group Manager referred the Lask case to the CID.

On April 24, 1981, the Taxpayers signed a Power of Attorney designating their present counsel to act on their behalf with regard to the IRS investigation. The Power of Attorney was delivered to Special Agent Mark W. Lawler acting on behalf of the IRS on or about April 29, 1981. Lawler testified that once such a document is received, it is the policy of the IRS to work through the Power of Attorney. Notwithstanding this policy, Lawler attempted to interview Mrs. Lask on July 7, 1981 "to ask her a few questions". At the time, Lawler knew that the Lasks had filed a Power of Attorney, but chose not to notify their designated representatives that he wished to speak with the Taxpayer.[2]

In carrying out his investigation during the pendency of the district court proceedings, Lawler also contacted the Taxpayers' stock broker, Stix & Company, one of the third-party record-holders involved in the case at bar.

Lawler testified that he has never handled a case where a revenue agent has given his work papers to the taxpayers' representative only to have a special agent subsequently called in to conduct a further investigation. Kenneth Thompson, Lawler's Group Manager, also testified that he had never had a case where the revenue agent's work papers were held by the taxpayers' representative.

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[2] The IRS Manual, Chapter 340, Section 4235.5 provides that the authorized representative designated in the Power of Attorney may only be bypassed if he has unresonably delayed or hindered the examination. The required steps for bypassing the Power of Attorney include written notice to the authorized representative. No such notice was received in this case.

In any event, during the course of his investigation, Special Agent Lawler had occasion to issue 19 summonses to third-party record-keepers with whom the Lasks had had prior financial dealings. Summonses were issued to the following record-keepers: St. Louis Union Trust Company, United Missouri Bank of St. Louis, St. Louis County Bank, Landmark Central Bank and Trust Company, Community Federal Savings and Loan Association, Roosevelt Federal Savings and Loan Association, and Stix & Co. Taxpayers directed these record-keepers not to comply with the summons pursuant to 26 U.S.C. §7609. The record-keepers declined to testify or to produce the requested documents. The instant enforcement action and appeal resulted.

The Decision of the District Court

On April 30, 1982, the Trial Court entered an Order granting the IRS petition to enforce the summonses (Appendix 1, pages A-1—A-4). In addition, the Trial Court quashed the Taxpayers' deposition notice and trial subpoenas duces tecum and issued a protective order as to their Rule 34 request for production of documents. On May 3, 1982, the Trial Court stayed enforcement of the summonses pending appeal to the Court of Appeals. Taxpayers filed a timely appeal to the Eighth Circuit.

The Decision of the Court of Appeals

On March 30, 1983, the Eighth Circuit affirmed the judgment of the Trial Court as to both enforcement of the summonses and denial of Taxpayers' discovery requests (Appendix 2, pages A-5—A-17).

V. REASONS FOR GRANTING THE WRIT

1. The Lower Court Erred In Holding That The Internal Revenue Service Summonses Directed To Third-Party Record-Keepers Should Be Enforced Inasmuch As The IRS Acted In Bad Faith In Conducting Its Investigation Of The Taxpayers Within The Meaning Of This Court's Decision In United States v. LaSalle National Bank.

Section 7602 of the Internal Revenue Code, 26 U.S.C. §7602, provides that the IRS, through the use of an administrative summons, may examine any books, records or other data necessary to determine the tax liability of any person or to ascertain the correctness of any return. To obtain enforcement of a Section 7602 summons, the IRS must fulfill certain requirements. First, the summons must be issued before any recommendation of criminal prosecution. *United States* v. *LaSalle National Bank*, 437 U.S. 298, 318 (1978). Second, the IRS must prove that it has met certain good faith standards in pursuing its investigation. These standards are as follows: 1) the investigation must be conducted pursuant to a legitimate purpose; 2) the inquiry must be relevant to that purpose; 3) the IRS must not already possess the information sought; and 4) all administrative steps required by the Internal Revenue Code must be followed. *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964).

The Supreme Court further elucidated the *Powell* standards in *United States* v. *LaSalle National Bank*, 437 U.S. 298. Mr. Justice Blackmun, writing for the majority, noted in footnote 20 that the requirements for the enforcement of an IRS summons are:

> "...not intended to be exclusive. Future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." 437 U.S. at 318, n. 20.

The conduct of the IRS in carrying out its investigation of the Taxpayers in this case is rife with examples of abuse of congressional authority via disregard for the administrative steps required by the Internal Revenue Code as well as violations of the agency's own operating manual. Petitioners believe that, taken together, these abuses establish a pattern and practice of bad faith conduct sufficient to deny enforcement of the summonses under footnote 20 of *LaSalle*.

It is well established that an IRS summons issued pursuant to 26 U.S.C. §7602 is enforceable only if it is issued in good faith and prior to a recommendation for criminal prosecution. *Donaldson* v. *United States*, 400 U.S. 517, 27 L.Ed.2d 580 (1971); *United States* v. *Troupe*, 438 F.2d 117, 119 (8th Cir. 1971).

The mere fact that CID Special Agent Lawler testified at the enforcement hearing that he had not recommended the Lask case for criminal prosecution does not end the inquiry. In *United States* v. *Wall Corp.*, 475 F.2d 893 (D.C. Cir. 1972), the Court stated:

> Our inquiry is not ended upon a determination that prosecution has neither been instigated nor recommended, since *Donaldson* also requires that a summons be issued "in good faith." Thus, if it can be shown that the investigating agent had already formed a firm purpose to recommend criminal prosecution even though he had not as yet made a formal recommendation, issuance of the summons would presumably be in bad faith. Similarly, if the civil liability were already determined, the summons would appear to be solely for a criminal purpose. 475 F.2d at 895.

See also *United States* v. *Lafko*, 520 F.2d 622 (3rd Cir. 1975). The Supreme Court, in *United States* v. *LaSalle National Bank*, 437 U.S. 298, 57 L.Ed.2d 221 (1978) stated that a summons enforcement action can be defeated by a showing that the IRS has

abandoned pursuit of the taxpayer's civil liability since this would indicate that the summons is directed solely at establishing criminal tax liability. 437 U.S. at 318. The facts of the case at bar show that the IRS had indeed abandoned pursuit of the Taxpayers' civil liability.

The evidence at the enforcement hearing established that transmittal of the revenue agent's work papers to the taxpayer's representative is a final step in completing the investigation. It is highly unusual for the CID to investigate the same tax years after the revenue agent's work papers have been turned over to the taxpayer for review. In fact, not one of the subpoenaed IRS witnesses could remember a similar series of events having ever occurred. Yet, that is precisely what happened in this case.

What was the motive of the IRS in assigning CID Special Agent Lawler to the Lask case in March 1981? Although there is no *direct* evidence linking the Lawler investigation to a criminal tax liability purpose, there is circumstantial evidence that supports such a conclusion.[3]

First, Barrett had already calculated the amount of understated income by the Taxpayers for 1978 and 1979. Nothing in his work papers indicate that Barrett considered his calculations of civil liability to be estimates or that they were subject to adjustment upon subsequent examination by a CID Special Agent. Second, Lawler testified that Form 2797, by which the case was referred to CID in February 1981, was a referral for criminal fraud. Finally, the very fact that the IRS initiated its investigation on the basis of information gained from

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[3] Taxpayer believes that discovery of their IRS tax file would provide such direct evidence. For example, the Form 2797 referral to the CID should indicate the IRS's motive in sending the case to the CID. In addition, the deposition of Barrett's Group Manager, Dennis Salveter, is crucial to gathering additional evidence of institutional bad faith.

an informant raises suspicions that the subsequent investigation had as its primary purpose the establishment of criminal tax liability.

Courts have recognized the interrelated civil-criminal nature of an IRS examination. *United States* v. *LaSalle National Bank*, 437 U.S. at 314. While the Taxpayers' burden of proving bad faith is a "heavy one", they submit that they have carried that burden in the case at bar. While the purpose of the IRS may initially have been to establish both civil and criminal tax liability, no valid civil tax determination or collection purpose existed after Revenue Agent Barrett completed his investigation in December 1980. Based upon the foregoing, Taxpayers submit that the subsequent investigation by CID Special Agent Lawler was in furtherance of the criminal enforcement objectives of the IRS. The current summons enforcement proceeding is part of that objective and illustrative of the bad faith conduct of the IRS.

An additional fact demonstrating the existence of institutional bad faith stems from the failure of the IRS to follow mandatory guidelines established in the Internal Revenue Manual for conducting investigations. The Internal Revenue Manual-Audit states:

> (e) If the examination reveals a material understatement of income in a given year, the case should be discussed with the group manager in regard to expanding the examination to subsequent or prior years and for possible referral to the Criminal Investigation function for consideration of fraud potential. *This discussion is mandatory in all examinations with understatements of income in excess of $10,000 in a given year. These discussions will be documented in the workpapers.* (Emphasis supplied).

Revenue Agent Barrett's work papers indicate that he found an understatement of income for the Taxpayers' 1978 tax year in

the sum of $29,158.81.[4] For the 1979 tax year, Barrett found the amount of understated income as $37,686.44. Under these circumstances, the manual provides for *mandatory* discussions between the Revenue Agent and the Group Manager. In addition, the Manual requires that these discussions be documented in the work papers.

Barrett acknowledged that there is no documentation of any discussions with his Group Manager reflected in his work papers for the 1978 and 1979 tax years as required by the Manual. This, despite the fact that Barrett was familiar with the Manual and educated in its use.

Violation by the IRS of its own mandatory guidelines is not to be taken lightly. As noted by the District Court in *United States* v. *Toussaint*, 456 F.Supp. 1069, 1073 (S.D. Tex. 1978), the IRS has "virtually made a contract with the public that it will comply with its own rules." Similarly, in *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969), the Court of Appeals commented as follows on the failure of the IRS to follow its own procedures:

> An agency of the government must scrupulously observe rules, regulations or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. 420 F.2d at 811.

See also: *United States, ex. rel. Accardi* v. *Shaughnessy*, 347 U.S. 360 (1954); *United States* v. *Prudden*, 424 F.2d 1021 (5th Cir. 1970); *United States* v. *Brod*, 324 F.Supp. 800 (S.D. Tex. 1971).

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[4] The 1978 work papers were prepared and delivered two months before the delivery of the 1979 work papers. By not complying with the manual guidelines Revenue Agent Barrett was able to obtain information for 1979 from the Taxpayers, which may not have been made available had a Special Agent entered the audit at that time.

Other provisions of the Manual were violated by the IRS. On April 24, 1981, the Taxpayers executed a Power of Attorney designating their present counsel to act on their behalf with regard to the IRS investigation. The Power of Attorney was delivered to the IRS on or about April 29, 1982.

The Internal Revenue Manual 4235, Chapter 340 discusses the power of attorney. It indicates at subparagraph 5 that the designated representative may be bypassed if he has unreasonably delayed or hindered the revenue agent's examination. The steps for bypassing the representative are set forth at IRM 4055.22 and require among other things that the agent obtain permission to bypass the power of attorney from the Chief, Examination Division and give written notice of such permission to the taxpayer and the designated representative.

At the April 16, 1982 hearing, CID Special Agent Lawler testified that once a power of Attorney is received, it is the policy of the IRS to work through the designated representative. Notwithstanding this policy, Lawler attempted to interview one of the Taxpayers, Ruth E. Lusk, "to ask her a few questions". At the time, Lawler knew that the Taxpayers had filed a Power of Attorney. Notwithstanding this knowledge, Lawler failed to obtain permission to bypass the Power of Attorney and failed to give the Taxpayers and their representative written notice of any such permission to bypass as required by the Manual. Lawler's conduct constituted a serious breach of IRS guidelines and procedures.[5]

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[5] While the Taxpayers would like to believe that violations of the IRS Manual are extraordinary occurrences, such is apparently not the case. Kenneth Thompson, IRS Group Manager, testified that he had seen violations of the Manual in the past caused, in part, by the fact that "there's so many things [in the Manual] that can be violated."

In *United States* v. *Dahlstrum*, 493 F.Supp. 966 (C.D. Cal. 1980), government's appeal dismissed 655 F.2d 971 (9th Cir. 1981), the District Court dismissed an indictment against a taxpayer because it found that the activities of the IRS constituted governmental misconduct and abuse. Specifically, the IRS had failed to follow its Internal Revenue Manual guidelines in conducting its audit of the taxpayer.

Taxpayers respectfully submit that they had met their burden of establishing that the IRS acted in bad faith in conducting the investigations of their 1978 and 1979 federal tax returns.

The failure of the IRS to follow Internal Revenue Code regulations as well as its own Manual provisions constitutes "agency abuse of congressional authority" within the meaning of footnote 20 in *United States* v. *LaSalle National Bank*.

II. The Lower Court Erred In Denying Taxpayers' Additional Discovery Requests And In Quashing Their Trial Subpoenas Duces Tecum.

In preparation for the Show Cause hearing in the trial court, Taxpayers filed a notice to take the depositions of several IRS employees as well as a Rule 34 Request for Production of Documents. The IRS responded by filing a motion to quash the deposition notice and for a protective order directed at the Rule 34 document request. Taxpayers also served trial subpoenas duces tecum upon the following IRS employees who they believed had participated in the Lask investigation: Group Supervisor Kenneth S. Thompson, Group Supervisor Kenneth Riley and Revenue Agent John M. Barrett. The IRS moved to quash these subpoenas. In its April 30, 1982 Order, the District Court quashed Taxpayers' deposition notice and trial subpoenas and issued a protective order covering the Rule 34 document re-

quest.[6] Under the facts of this case as well as the controlling caselaw, Taxpayers submit that they are entitled to conduct the requested discovery.

It is undisputed that a district court may limit discovery in summons enforcement proceedings in order to prevent excessive delay in the conduct of the investigation. *Donaldson* v. *United States*, 400 U.S. 517, 529, 27 L.Ed.2d 580 (1971); *United States* v. *Kis*, 658 F.2d 526, 540 (7th Cir. 1981); *United States* v. *Moon*, 616 F.2d 1043, 1047 (8th Cir. 1980). Notwithstanding this fact, courts have allowed the taxpayer to conduct certain pre-hearing discovery in cases where institutional bad faith is alleged. *United States* v. *Genser*, 595 F.2d 146, 152 (3rd Cir. 1979) (allowing limited preliminary discovery); *United States* v. *Wright Motor Co.*, 536 F.2d 1090, 1094 (5th Cir. 1976) (allowing pre-hearing deposition of Special Agent); *United States* v. *Roundtree*, 420 F.2d 845, 852 (5th Cir. 1969) (allowing pre-hearing deposition of IRS agent). Other courts have held that the taxpayer should conduct his discovery in open court during the hearing. *United States* v. *Kis*, 658 F.2d at 543.

In the case at bar, Taxpayers were able to conduct some limited discovery at the April 16, 1982 hearing through questioning of the subpoenaed IRS employees.[7] However, they were precluded from examining any of the documents requested in

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[6] The testimonial aspect of the District Court's Order was rendered moot by the fact that the subpoenaed witnesses appeared and testified at the April 16, 1982 hearing. Taxpayers' appeal on this point is directed primarily at the District Court's decision denying them access to the documents requested from the IRS.

[7] During the course of this questioning, Taxpayers learned for the first time the identity of Revenue Agent Barrett's Group Manager during the relevant time period. Taxpayers believe that this Group Manager's testimony is crucial to gathering additional evidence of bad faith on the part of the IRS.

the subpoenas. Taxpayers submit that examination of these documents was crucial to their case and would not have caused any undue delay in the summons enforcement hearing. Based upon the evidence of IRS bad faith presented by Taxpayers at the hearing, the District Court erred in denying them access to the requested documents.

In *United States* v. *Kis*,658 F.2d at 542, the Seventh Circuit Court of Appeals held that:

> ...[s]ome limited discovery of documents believed to be in the possession of the Service may be permitted before the hearing, but only if the taxpayer can make a positive showing that the particular documents are necessary to his defense and that they provide information that could not otherwise be obtained at the hearing.

Taxpayers believe that the documents they have requested meet these criteria. For example, Form 2797, by which the Taxpayers' case was referred to the CID, should indicate on its face the purpose of the IRS in sending the investigation to the criminal division.

In its March 30, 1983 opinion, the Eighth Circuit affirmed the denial of discovery holding that discovery in a summons enforcement proceeding is the exception rather than the rule. (Appendix 2, pages A-5—A-17). On April 7, 1983, however, the Court of Appeals for the Seventh Circuit held that Taxpayers are entitled to the "full benefit of discovery rights." *United States* v. *Kemper Money Market Fund, Inc.*, No. 82-2384, slip op. at 8 (7th Cir. April 7, 1983). Specifically, the Seventh Circuit stated:

> It is true that 'once they have intervened, taxpayers face an almost insurmountable hurdle' in attempting to block enforcement of an IRS summons. Be that as it may, each taxpayer has a statutory right to approach that hurdle as a party to the proceedings, with the full benefit of discovery rights conferred by virtue of that status.

Petitioners submit that this apparent conflict between the Eighth and Seventh Circuits requires that this Court grant certiorari in order to clarify the precise limits, if any, of discovery by affected taxpayers in IRS summons enforcement proceedings.

CONCLUSION

Petitioners assert that the acts of the IRS, taken together, establish a pattern and practice of bad faith conduct sufficient to deny enforcement of the IRS summons due to agency abuse of its congressional authority within the meaning of *United States* v. *LaSalle National Bank*. It is now time for this Court to review and give further definition to the limits of agency conduct as referenced in footnote 20 of *LaSalle*.

In addition, Petitioners respectfully submit that it is proper and necessary for this Court to review the scope of discovery rights afforded to a taxpayer-intervenor in IRS summons enforcement cases. A writ of certiorari should thus be granted.

Respectfully submitted,

LASHLY, CARUTHERS,
BAER & HAMEL
A Professional Corporation

By: Michael G. Goldstein
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939

Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-MISC-018

United States of America, et al.,
Petitioners,

v.

St. Louis Union Trust Company,
Respondent.

No. 82-MISC-019

United States of America, et al.,
Petitioners,

v.

United Missouri Bank of St. Louis,
Respondent.

No. 82-MISC-020

United States of America, et al.,
Petitioners,

v.

Bank of St. Louis,
Respondent.

No. 82-MISC-021

United States of America, et al.,
Petitioners,

v.

St. Louis County Bank,
Respondent.

No. 82-MISC-022

United States of America, et al.,
Petitioners,

v.

Landmark Central Bank & Trust Company,
Respondent.

No. 82-MISC-023

United States of America, et al.,
Petitioners,

v.

Community Federal Savings & Loan Association,
Respondent.

No. 82-MISC-024

United States of America, et al.,
Petitioners,

v.

Roosevelt Federal Savings & Loan Association,
Respondent.

No. 82-MISC-025

United States of America, et al.,
Petitioners,

v.

Stix and Company, Inc.,
Respondent.

ORDER

(Filed April 30, 1982)

These cases are now before the Court on the petitioners' petition to enforce Internal Revenue Service subpoenas directed to respondents. The subpoenas in question seek the production of documents in the possession of respondents relative to James E. Lask and Ruth L. Lask. James E. and Ruth L. Lask have moved to intervene in this matter, which said motion was granted.

On March 1, 1982, intervenors filed a Notice of Deposition to take the deposition of Mark Lawler, Special Agent, Internal Revenue Service, John Barrett, Revenue Agent, Internal Revenue Service, Kenneth S. Thompson, Group Supervisor, Internal Revenue Service, and Kenneth Riley, Group Supervisor, Internal Revenue Service. Intervenors at the same time also filed a Rule 34, Request for Production and Inspection of Documents.

On March 9, 1982, petitioners filed a Motion to Quash said Notice of Deposition and for a Protective Order for the Request for the Production of Documents. The Court finds that the petitioners' Motion to Quash and for a Protective Order should be granted, and accordingly, said Motion to Quash and for a Protective Order is hereby granted.

On April 7, 1982, intervenors served subpoenas duces tecum on John Barrett, Revenue Agent, IRS, Kenneth S. Thompson, Group Supervisor, IRS, and Kenneth Riley, Group Supervisor, IRS, to appear at the hearing scheduled for April 16, 1982, at 10:00 A.M., and to bring with them various documents from their files. On April 13, 1982, petitioners filed a Motion to Quash the subpoenas duces tecum. The Court finds that petitioners' Motion to Quash should be granted, and accordingly, said Motion to Quash is hereby granted.

A hearing was held on the petitioners' Petition to Enforce the IRS Subpoenas on April 16, 1982. All eight matters, 82-MISC-018 through 82-MISC-025, were consolidated for trial. Petitioner Mark W. Lawler is a Special Agent with the Internal Revenue Service. In the course of his duties, he is investigating the possible tax liability of James and Ruth Lask. The information sought is not presently in possession of the Internal Revenue Service, and the only means of obtaining the information is through the enforcement of the instant subpoenas. The information sought is relevant to the investigation of James and Ruth Lask. The subpoenas in question were issued prusuant to 26 U.S.C. § 7602.

At present, petitioner Mark Lawler has not recommended criminal prosecution of James or Ruth Lask to his supervisors. The Internal Revenue Service has not referred the investigation to the U.S. Department of Justice for prosecution.

Under the circumstances, the Petitions to Enforce the Subpoenas will be granted. Therefore,

IT IS HEREBY ORDERED that petitioner's Petitions to Enforce the Subpoenas be and are granted, and that the respondents:

St. Louis Union Trust Company
United Missouri Bank of St. Louis
Bank of St. Louis
St. Louis County Bank
Landmark Central Bank & Trust Company
Community Federal Savings & Loan Association
Roosevelt Federal Savings & Loan Association
Stix and Company, Inc.

shall comply with such subpoenas within fifteen (15) days of this date.

Dated this 30th day of April, 1982.

(Illegible)
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1526

Appeal from the United States
District Court for the Eastern
District of Missouri

United States of America,
and Mark W. Lawler, Special
Agent of the Internal Revenue
Service,
Appellees,

v.

James E. Lask and Ruth L.
Lask,
Appellants.

Submitted: October 12, 1982

Filed: March 30, 1983

Before LAY, Chief Judge, McMILLIAN and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Taxpayers James E. Lask and Ruth L. Lask appeal from the district court* order directing enforcement of Internal REvenue Service summonses issued to various third-party recordkeepers. Taxpayers contend (1) that the IRS acted in bad faith in carrying out the investigation, (2) that a portion of the time period covered by the IRS summonses is barred by the statute of limitations contained in 26 U.S.C. § 6501(a) (1976), and (3) that the district court erred in denying taxpayers' discovery requests and in quashing their trial subpoenas duces tecum. We affirm.

In July 1980, Revenue Agent John Barrett, acting on information given to the IRS by an unidentified informant, began an investigation into the federal tax liability of taxpayers for 1978 and 1979. Using information which the taxpayers provided, Barrett found significant discrepancies between the amount of tax liability he calculated for 1978 and 1979 and the amount of tax liability taxpayers reported for those two years. Barrett provided taxpayers' tax representative, Albert Grabel, with copies of his work papers and attached a memorandum requesting comments and an explanation for the discrepancies.

Barrett held a series of discussions with his Group Manager and in February 1981 referred the case to the Criminal Investigation Division of the IRS. In early 1981, Special Agent Mark Lawler, who had been assigned to the investigation, issued a summons to the taxpayers requesting production of various records and documents in their possession. Taxpayers complied with this summons and brought in the requested records. Based on its examination of these records, the IRS decided to expand its investigation to include taxpayers' 1977 tax returns.

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* The Honorable Clyde S. Cahill, United States District Judge for the Eastern District of Missouri.

Between May 21, 1981 and June 23, 1981, Special Agent Lawler issued an IRS summons, pursuant to 26 U.S.C. § 7602 (1976), to eight third-party recordkeepers[1] seeking various records and documents in their possession relating to taxpayers' financial activities. Taxpayers directed these recordkeepers not to comply with the summonses.

On January 26, 1982, the Government filed petitions with the district court for enforcement of these eight summonses. Taxpayers moved to intervene pursuant to 26 U.S.C. § 7609(b)(1) (1976), and filed answers to the Government's petitions. Taxpayers also filed a deposition notice and a Rule 34 Request for Production of Documents, and, in preparation for the show cause hearing, served subpoenas duces tecum upon several IRS employees who participated in the investigation.

The district court consolidated the eight summons enforcement proceedings, and on April 30, 1982, ordered that the IRS summonses be enforced. The court quashed taxpayers' deposition notice and subpoenas duces tecum and issued a protective order covering the Rule 34 document request. This appeal followed.

I. The Good Faith Requirements of *United States* v. *Powell*

Section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602 (1976), provides that the IRS, through the use of an administrative summons, may examine any books, papers, records, or persons in determining the tax liability of any person

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[1] Summonses were issued to the following recordkeepers: St. Louis Union Trust Co., United Missouri Bank of St. Louis, Bank of St. Louis, St. Louis County Bank, Landmark Central Bank & Trust Co., Community Federal Savings & Loan Association, Roosevelt Federal Savings & Loan Association, and Stix and Company, Inc.

or ascertaining the correctness of any return.[2] The IRS, however, has no power of its own to enforce the summons but must apply to the district court in order to compel production of the requested materials. *See* 26 U.S.C. §§ 7402(b), 7604(a) (1976). To obtain enforcement of a section 7602 summons, the IRS must fulfill certain requirements. First, the summons must be issued before the IRS recommends to the United States Department of Justice that a criminal prosecution be undertaken. *United States* v. *LaSalle National Bank,* 437 U.S. 298, 318 (1978). Second, the IRS must show that it has satisfied certain standards of good faith developed by the Supreme Court in *United States* v. *Powell,* 379 U.S. 48 (1964). These standards are fourfold: (1) the investigation is being conducted pursuant to a legitimate purpose; (2) the inquiry is relevant to that purpose; (3) the IRS does not already possess the information sought; and (4) the administrative steps required by the Internal Revenue Code have been followed. *Id.* at 57-58. Once the IRS establishes a prima facie case, the burden shifts to the summonee to disprove one of these elements or to demonstrate that judicial enforcement of the summons would otherwise constitute an abuse of the court's process; that burden is a heavy one. *See United States* v. *LaSalle National Bank,* 437 U.S. at 316; *United States* v. *Barter Systems, Inc.,* 694 F.2d 163, 167 (8th Cir. 1982); *United States* v. *First National Bank of Mitchell,* 691 F.2d 386, 388 (8th Cir. 1982) (per curiam).

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[2] Section 7602 provides in its entirety as follows:

§ 7602. Examination of books and witnesses

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

In the present case, the record establishes that the IRS made a prima facie case for enforcement of these summonses. Appellants nonetheless contend that the IRS acted in bad faith by violating provisions of the Internal Revenue Code and of the IRS' Internal Revenue Manual.

Taxpayers' first argument is that the current summons enforcement proceedings are part of a "second inspection" in violation of 26 U.S.C. § 7605(b) (1976). Section 7605(b) provides that "only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." The short answer to taxpayers' argument is that the quoted portion of section 7605(b) has no application to third-party records. Although the records being sought by the IRS may document taxpayers' financial activities during 1977-79, they do not belong to the taxpayers, but to the respective third-party recordkeepers. Thus, we do not consider such third-party records as falling within the statutory phrase, "a taxpayer's

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(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

books of account." *See United States* v. *MacKay*, 608 F.2d 830, 834 (10th Cir. 1979); *United States* v. *Chemical Bank*, 593 F.2d 451, 458 (2d Cir. 1979); *De Masters* v. *Arend*, 313 F.2d 79, 85-86 & n.12 (9th Cir.), *cert. dismissed*, 375 U.S. 936 (1963). Accordingly, taxpayers' contention that they have received no written notice that an "additional inspection is necessary" must be rejected.[3]

Taxpayers' second argument is that the IRS had abandoned all civil collection purposes at the time of the issuance of the summonses and that the summonses were therefore issued as part of a purely criminal investigation. If this were the case, the summonses would have been issued for an improper purpose and thus in bad faith. *See United States* v. *LaSalle National Bank*, 437 U.S. at 316-18 & n.18. Taxpayers concede they have no direct evidence of abandonment but rely instead on circumstantial evidence which they argue is sufficient to satisfy their admittedly heavy burden of proof.[4]

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[3] The only notice that is relevant here is that contained in 26 U.S.C. § 7609(a) (1976). Under section 7609(a), taxpayers are entitled to receive notice that the IRS has issued the summonses in question to the respective third-party recordkeepers. Taxpayers do not contend that they have failed to receive such notice, nor could they successfully urge that here. That taxpayers intervened in the proceeding is ample evidence that they received notice.

[4] Taxpayers do not contest the district court's findings that the IRS has not referred the investigation of taxpayers to the United States Department of Justice for prosecution, and that Special Agent Lawler has not recommended criminal prosecution of taxpayers to his supervisors.

Taxpayers point to Revenue Agent Barrett's work papers for 1978 and 1979, and argue that because "[n]othing in his work papers indicate [sic] that Barrett considered his calculations of civil liability to be estimates or that they were subject to adjustment upon subsequent examination by a CID Special Agent," no valid civil tax determination or collection purpose existed after Barrett completed his examination in December 1980.

In effect, taxpayers would have us ignore the testimony of Special Agent Lawler and Revenue Agent Barrett that the IRS is presently engaged in a joint civil/criminal investigation, and that the summonses in question were issued pursuant to this joint investigation. Additional testimony shows that the provision of work papers "could be on-going through the audit" and thus would not necessarily be the final step of an investigation. It is evident that the work papers here were given to taxpayers' representative in order for him to explain the discrepancies between the amount of tax the revenue agent determined taxpayers owed and the amount of tax actually reported. As clearly noted in a memorandum attached to Barrett's work papers, the calculations included therein were "tentative" and "subject to decrease by a satisfactory explanation" of various items and amounts. Although the record shows that Barrett had discussions with taxpayers' representative, it does not appear that taxpayers have ever provided the IRS with a satisfactory explanation. Nor is there any evidence to suggest that the IRS has made any civil assessment against taxpayers based on the calculations the revenue agent derived from his initial examination. Thus, we cannot construe the revenue agent's provision of work papers to taxpayers' representative as demonstrating a completion of the IRS' civil investigation.

Taxpayers emphasize two other circumstantial factors to show the abandonment of a civil purpose: the IRS' use of an informant, and the special agent's substantial role in this investigation. Neither of these requires detailed discussion. As for the first factor, the use of an informant, we do not view the

source of the IRS' information to be of any consequence here. *See United States* v. *LaSalle National Bank*, 437 U.S. at 300, 318 (although IRS derived information for investigation from informant, court found no justification in record to preclude enforcement of summons). The IRS is permitted to accept all information that is offered it. *See United States* v. *Davis*, 636 F.2d 1028, 1036 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981); *United States* v. *Cortese*, 614 F.2d 914, 920 (3d Cir. 1980). The second factor has been raised numerous times before and has been accorded little significance. *See, e.g., United States* v. *LaSalle National Bank*, 437 U.S. at 314-16; *United States* v. *Pillsbury Credit Union*, 661 F.2d 1195, 1197 (8th Cir. 1981) (per curiam); *United States* v. *Davis*, 636 F.2d at 1036; *United States* v. *Moll*, 602 F.2d 134, 139 n.7 (7th Cir. 1979). Although special agents are members of the IRS' Criminal Investigation Division, they may be charged with both criminal and civil responsibilities. *See United States* v. *Pillsbury Credit Union*, 661 F.2d at 1197; *United States* v. *Garden State National Bank*, 607 F.2d 61, 65 n.3 (3d Cir. 1979); [II Audit] Internal Revenue Manual (CCH) § 4565.31(4), at 8177-15 (Nov. 21, 1980). This was the case here as the evidence shows that the special agent was seeking to determine taxpayers' correct tax liabilities as well as determining whether to prosecute.

Taxpayers refer to various other evidence to show the absence of a civil purpose. This includes the revenue agent's uncommon practice of referring taxpayers' case to the Criminal Investigation Division after his work papers were turned over to taxpayers to review, as well as the agent's use of Form 2797 Referral Report for Potential Fraud cases in making the referral. We have carefully reviewed the record, and find this evidence to be unpersuasive.

Taxpayers' third argument is that the IRS has violated various sections of the Internal Revenue Manual in conducting its investigation. Taxpayers claim that Special Agent Lawler violated section 4055.22 of the Manual, [I Audit] Internal

Revenue Manual (CCH) § 4055.22, at 7037 (Apr. 2, 1979), by attempting to contact Mrs. Lask directly after taxpayers had filed a power of attorney with the IRS. Taxpayers also claim that Revenue Agent Barrett violated section 4253.2(e) of the Manual, [1 Audit] Internal Revenue Manual (CCH) § 4253.2(e), at 7235-6 (Nov. 2, 1981), by failing to document discussions that he had with his group manager concerning the underpayment of tax that he calculated for taxpayers' tax years 1978 and 1979.

With respect to the alleged violation of section 4055.22 of the Internal Revenue Manual, it suffices to say that this section has no application to the actions of the special agent here. This section establishes procedures to be used by the Examination Division, while another provision of the Manual. [5 Administration] Internal Revenue Manual (CCH) § 9359, at 28,149 (Aug. 16, 1982), governs the conduct of agents of the Criminal Investigation Division, including the conduct of the special agent here. *See United States* v. *Will*, 671 F.2d 963, 967 (6th Cir. 1982). Our review of these guidelines reveals that there is no requirement that any contact with the taxpayers be made initially through the representative identified in the power of attorney.[5]

With respect to section 4253.2(e), taxpayers have not demonstrated that a violation has occurred. Section 4253.2(e) provides:

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[5] Section 9359 cross-references section 342.19 of the Handbook for Special AGents, [6 Administration] Internal Revenue Manual (CCH) § 342.19, at 28,681-7 (Aug. 12, 1982), which provides that a taxpayer or his representative who has a power of attorney must specially request, either orally or in writing, that contacts with the taxpayer by the IRS be made through the taxpayer's representative. The implication is that if the taxpayer or his representative fails to make this specific request, a special agent may contact the taxpayer directly. We find no evidence in the record that taxpayers or their representative made a specific request.

> (e) If the examination reveals a material understatement of income in a given year, the case should be discussed with the group manager in regard to expanding the examination to subsequent or prior years and for possible referral to the Criminal Investigation function for consideration of fraud potential. *This discussion is mandatory in all examinations with understatements of income in excess of $10,000 in a given year. These discussions will be documented in the workpapers.*

Id. (emphasis added). Revenue Agent Barrett testified that none of the work papers he provided to taxpayers' representatibe contained any documentation of discussions with his group manager, even though the work papers show understatements of income in excess of $10,000 for each of the tax years 1978 and 1979. Nonetheless, because the investigation is not yet complete, and because section 4253.2(e) imposes no time requirement for documenting discussions, we cannot say that a violation has occurred.

In sum, taxpayers have not shown any conduct in this investigation from which to infer institutional bad faith.

II. The Statute of Limitations

Taxpayers also contend that the three-year statute of limitations for ordinary assessment deficiencies, 26 U.S.C. § 6501(a)(1976), should bar enforcement of these summonses as they relate to the 1977 tax year.[6] This question, however, has

[6] The statute provides as follows:

> § 6501. Limitations on assessment and collection
>
> (a) General rule
>
> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

been determined adversely to taxpayers in *United States* v. *Powell*, 379 U.S. 48, 58 (1964), in which the Supreme Court stated, "The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing . . . that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined." The Court further observed, "The present three-year limitation on Assessment of ordinary deficiencies relieves the taxpayer of concern for further assessments of that type, but it by no means follows that it limits the right of the Government to investigate with respect to deficiencies for which no statute of limitations is imposed." *Id.* at 56 n.15. In this case, discovery of a false or fraudulent return would completely remove any limitation on assessment under 26 U.S.C. § 6501(c)(1)(1976). Although no fraud is alleged in the petitions for enforcement, this court has held that the IRS may require the production of records for time-barred years which are relevant to its investigation, even though there is no allegation or evidence of fraud. *United States* v. *Giordano*, 419 F.2d 564, 568 (8th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970). To hold otherwise "might well seriously impede the Government's right to collect lawfully due taxes solely on account of a taxpayer's refusal to cooperate and his utilization of delaying and hypertechnical tactics." *Id.* Accordingly, we conclude that the three-year statute of limitations does not bar enforcement of these summonses.

III. The Discovery Requests

Finally, taxpayers contend that the district court erred in denying their discovery requests and in quashing the subpoenas duces tecum. The district court has discretionary authority under Fed. R. Civ. P. 81(a)(3) and may limit the availability of discovery in a summons enforcement proceeding. *See Donaldson* v. *United States*, 400 U.S. 517, 528-29 (1971); *United States* v. *National Bank of South Dakota*, 622 F.2d 365, 367 (8th Cir. 1980)(per curiam). Because of the summary nature of an enforcement proceeding, discovery is the exception rather

than the rule. *See United States* v. *Moon*, 616 F.2d 1043, 1047 (8th Cir. 1980) (per curiam); *see also United States* v. *Security Bank & Trust Co.*, 661 F.2d 847, 851 (10th Cir. 1981) (limited discovery appropriate because criminal and civil elements inherently intertwined in tax investigation). The taxpayer must make a substantial preliminary showing of abuse of the court's process before even limited discovery need be ordered. *See United States* v. *Moon*, 616 F.2d at 1047; *United States* v. *Morgan Guaranty Trust Co.*, 572 F.2d 36, 42 n.9 (2d Cir.), *cert. denied*, 439 U.S. 822 (1978); *United States* v. *Salter*, 432 F.2d 697, 700 (1st Cir. 1970).[7] In this case, taxpayers had an opportunity directly to examine several IRS employees who participated in the investigation. In addition, taxpayers were afforded a full opportunity to cross-examine the Government's chief witness, Special Agent Lawler. Since taxpayers failed to raise any substantial question regarding the validity of the Government's purpose, the district court was well within its discretion to deny taxpayers' discovery requests and to quash the subpoenas duces tecum.

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[7] In *United States* v. *Salter*, 432 F.2d 697 (1st Cir. 1970), the First Circuit adopted the following recommendation for regulating discovery in an enforcement proceeding:

> The general solution would probably be for the district court to proceed directly to a hearing at which, if desired, the summonee could examine the agent who issued the summons, concerning his purpose. The court could then, by observation and, where necessary, its own questioning of the agent, make its own determination of whether exploration, as by discovery, seemed to be in order.

Id. at 700. The court further observed, "If, at the endo fhte hearing, there remains a substantial question in the court's mind regarding the validity of the government's purpose, it may then grant discovery." *Id.* The district court appears to have followed these procedures. Such procedures help avoid the prehearing use of depositions and interrogatories that may be unnecessary and that would delay the IRS' examination. *See generally* 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶81.06[1] (2d ed. 1982).

The order of the district court enforcing the summonses is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT